Investigation Report

Complaint against Lands Department for refusing to disclose the amounts of premium and administration fee paid by an applicant for change of land use who was granted a waiver in the form of a letter of no objection
(A case involving Code on Access to Information)

On 5 June 2018, Ms Y complained to this Office against the Lands Department ("LandsD").

The Complaint

2. Allegedly, on 12 April 2018, Ms Y made an enquiry with LandsD regarding a concert held by a theme park ("the Park") at its public car park ("the Car Park"), identifying herself as a journalist from a media organisation. On 16 April, she requested under the Code on Access to Information ("the Code") that LandsD disclose the details of the letter of no objection obtained by the Park for the concert. The details requested included the waiver obtained by the applicant for change of use, the date, time and site area of the concert held at the Car Park and the amounts of the premium and administration fee ("the relevant fees") that the lot owner (i.e. the Park) paid.

3. In its reply of 4 June to Ms Y, LandsD stated that its District Lands Office, Islands had issued a letter of no objection, which was a one-time document, to grant the approval to the lot owner to hold a concert at the Car Park between 25 April and 17 May 2018 and the site area involved was 41,180 square feet. Nevertheless, subject to the reasons for refusal in paragraphs 2.14(a) ("third party information") and 2.16 ("business affairs") of the Code (**paragraph 6(1) and (2)** below), LandsD considered that it could not provide information on the relevant fees on grounds that such information was commercially sensitive information relating to the lot owner, whose competitive or financial position might be harmed by

disclosure of the information. Moreover, since the lot owner had refused to have the information disclosed, information about the relevant fees should be kept in strict confidence in accordance with the explicit and implicit understanding.

4. Ms Y accused LandsD of unreasonably refusing to provide information on the relevant fees on the following grounds:

(1) Ms Y took the view that LandsD, as the party enforcing the lease conditions, was obliged to process the application for short-term change of land use and decide the amount of fees to be paid. The information considered by LandsD in processing the application was not "third party information" and that there was no principle of or consensus on confidentiality involved. Ms Y pointed out that LandsD usually granted permission to an application for short-term change of land use in the form of a Short Term Waiver ("STW"). It would be registered with the Land Registry ("LR") and was therefore no confidential or sensitive commercial information. Nevertheless, on this occasion, LandsD granted the Park's application in the form of a letter of no objection, making it unnecessary for the details of the waiver and amounts of the relevant fees to be registered with LR. Such practice was contrary to the Government principles of transparency and accountability.

(2) Ms Y considered that the information about the relevant fees was laid down in a contract between the Government and the other party (the Park), which was not commercially sensitive information. In her view, it was only LandsD's subjective opinion, without any justification, that disclosure of such information would have adverse impact on the related parties (LandsD and the Park). Moreover, Ms Y pointed out that the Government had all along adopted an open and transparent approach in handling the tenancy of the

Central Harbourfront Event Space to enable public monitoring. As the Park was operated under a public-private partnership with the Government holding more than 50% of interest, the potential interests of new businesses of the Park (i.e. holding a concert at the Car Park) should also be subject to public monitoring. Therefore, LandsD should disclose information on the relevant fees, or there would be no way of monitoring that by members of the public.

Our Findings

5. This Office conducted a full investigation into this case on 21 June 2018. We submitted our draft investigation report to LandsD on 15 November and received the Department's comments on 3 December. Later on 27 December, we wrote to LandsD again to request that the Department elaborate and explain its arguments. On 15 January 2019, LandsD replied to our letter. After examining the information and explanation provided by LandsD, we completed our investigation on 8 February with the following findings.

Relevant Paragraphs of the Code and its Guidelines on Interpretation and Application

6. The Code requires that information kept by Government departments (including LandsD) should be released as far as practicable to enable adequate public understanding of the Government and its services unless the information requested falls into the categories of information which may be withheld under Part 2 of the Code, including:

(1) Paragraph 2.14(a) of the Code: Information held for, or provided by, a third party under an explicit or implicit understanding that it would not be further disclosed. However, such information may be disclosed with the third party's consent, or if the public interest in disclosure outweighs any harm or prejudice that would result.

(2) Paragraph 2.16 of the Code: Information including commercial, financial, scientific or technical confidences, trade secrets or intellectual property the disclosure of which would harm the competitive or financial position of any person.

7. Moreover, paragraph 2.1.1 of the Guidelines of Interpretation and Application of the Code states that the withholding of information under most provisions of Part 2 of the Code (including paragraphs 2.14(a) and 2.16) is subject to a "harm or prejudice test". The department concerned has to consider whether the public interest in disclosure of such information outweighs any harm or prejudice that could result from disclosure.

Response from LandsD

8. LandsD explained that it had sought the consent of the lot owner in writing to disclose information requested by Ms Y. In reply, the lot owner gave consent to disclosure of the date, time and site area involved, but not of the relevant fees. The lot owner considered the relevant fees commercially sensitive information under paragraph 2.16 of the Code.

9. After we commenced our investigation into this complaint, LandsD wrote to the lot owner again. The lot owner reiterated that the relevant fees were commercially sensitive information and maintained its stance not to consent to disclosure of such information.

10. Furthermore, LandsD had sought legal advice on Ms Y's complaint and her arguments (**paragraph 4** above). Having taken into account all the information and the legal advice obtained, LandsD conceded that there might not be sufficient justification to treat the information about the relevant fees as "third party information" under paragraph 2.14(a) of the Code. LandsD also agreed that there might not be explicit or implicit agreement or understanding between the Department and the lot owner that such

information should be kept in strict confidence.

11. Nevertheless, LandsD held that the relevant fees should fall into the category of commercial confidence under paragraph 2.16 of the Code, and that disclosure of such information might impede the lot owner's capacity in negotiating similar commercial activities with its business partners, thus putting the lot owner in a disadvantaged position when organising similar commercial activities in future.

12. LandsD also said it had taken into account the issue of public interest (**paragraph 7** above) and seen no evidence indicating that the public interest to disclose the relevant fees outweighed the harm that the disclosure might cause to the lot owner. Hence, LandsD considered it unjustifiable to disclose the information.

13. As regards Ms Y's indication that "LandsD usually granted permission to an application for short-term change of land use in the form of an STW, which would be registered with LR" (**paragraph 4(1)** above), LandsD clarified that STWs were applicable to applications for items with a longer duration while letters of no objection were applicable to one-time or short-term activities. In case of permanent amendments to lease conditions (such as transactions of land exchange or land lease amendments), LandsD normally sends the lease document concerned to LR for registration. Generally speaking, LandsD would not register with LR any one-time or short-term approval or waiver.

14. Regarding the lease of the Central Harbourfront Event Space (**paragraph above 4(2)** above), LandsD pointed out that the two pieces of harbourfront Government land off Lung Wo Road and Central Piers No. 9 and No. 10 were granted short-term leases through the procedures of open tender, where the tenderer had agreed that the Government, after granting the tender, could release the results in response to public or media enquiries. While these two pieces of land were Government land granted through open tender, the site in the Car Park involved was private land. As the related land documents were of different nature, they could not

be compared with one another.

Our Comments

15. The gist of Ms Y's complaint was LandsD's unreasonable refusal to provide information about the relevant fees. In its reply to Ms Y, LandsD invoked paragraphs 2.14(a) and 2.16 of the Code as the reasons for refusal to disclose the information she requested (**paragraphs 2 and 3** above).

Paragraph 2.14(a) of the Code – Third Party Information

16. The terms of letters of no objection represent an agreement reached after discussion between LandsD, as the Government agent, and the lot owner, while the relevant fees would finally be decided by LandsD. As LandsD is the owner and holder of such information, the information is not held or provided by the lot owner (a third party). In general, the contents of a contract between a Government department and a third party are not deemed to be information obtained from the third party. In our view, information relating to letters of no objection cannot be regarded as "third party information" under the Code. Hence, it was not appropriate for LandsD to have invoked initially paragraph 2.14(a) as the reason for refusing to disclose information about the relevant fees to Ms Y. Indeed, the legal advice sought by LandsD also indicated that the reason set out in paragraph 2.14(a) of the Code should not apply (**paragraph 10** above).

Paragraph 2.16 of the Code – Business Affairs

17. We accepted LandsD's view that the relevant fees fell under the category of commercial confidence in paragraph 2.16 of the Code. LandsD explained that the lot owner's competitive position might be harmed if the information was disclosed, and that it did not see any major public interest that justified disclosure of such information (**paragraphs 11 and 12** above). In the circumstances of this case, where there was no prior indication that the information might be disclosed, we found this argument of LandsD

not unreasonable. After all, the concert that the lot owner organised at the Car Park was a one-off event, which was not entirely the same as any long-term lease of Government land.

18. In view of the analysis in paragraphs 15 to 17 above, The Ombudsman considered it acceptable that LandsD invoked paragraph 2.16 of the Code as the reason to refuse disclosure of the relevant fees to Ms Y. Nevertheless, it was inappropriate that the Department had initially invoked paragraph 2.14(a) of the Code as one of the reasons for refusal. As such, this complaint was unsubstantiated but other inadequacies were found on the part of LandsD.

19. That said, if LandsD could disclose the relevant fees of an STW by means of registration with LR (**paragraph 13** above), we see no reason why LandsD could not set out in its letters of no objection in future that similar information might be disclosed.

Recommendations

20. The Ombudsman recommended that LandsD:

(1) consider adding to letters of no objection in future the terms stating that the Government can disclose information in the letters (including the relevant fees); and

(2) take reference from this case and remind its staff to accurately understand and apply the Code.

Office of The Ombudsman
February 2019